No. 85-2042

Supreme Court, U.S.
FILED
JUN 20 1986
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

October Term, 1985

CARL CARBONE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Question Presented

1. Was the sentence imposed upon petitioner not so grossly disproportionate to his offense as to violate the Eighth Amendment prohibition against cruel and unusual punishment?

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Statement of the Case

This brief is in opposition to petitioner's application for a writ of *certiorari* to review the order of the New York State Court of Appeals, entered March 25, 1986, denying without opinion the petitioner's application for leave to appeal from an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated February 3, 1986, which unanimously affirmed the petitioner's judgment of conviction. *People* v. *Carbone*, —— AD2d ——, 498 N.Y.S. 2d 74 (2d Dept. 1986),

lv. den. 67 N.Y.2d 881 (1986). Petitioner was convicted in a judgment of the Supreme Court of the State of New York, Criminal Term, Queens County, rendered July 20, 1984, of criminal sale of a controlled substance in the second degree, N.Y. Penal Law §220.41, and sentenced to an indeterminate term of incarceration of six years to life imprisonment.

Statement of Facts

Petitioner was charged in an indictment with two counts of criminal sale of a controlled substance in the first degree. The charges arose out of two separate transactions, occurring on October 27, 1983 and November 14, 1983, respectively, in which petitioner was alleged to have sold two or more ounces of cocaine to an undercover police officer. Petitioner was arrested following the second transaction.

On June 29, 1984, petitioner Carbone, represented by counsel, interposed a plea of guilty to one count of a reduced charge of criminal sale of a controlled substance in the second degree in full satisfaction of the indictment.

On July 20, 1984, Justice Vincent Naro of the Supreme Court of the State of New York, before whom petitioner had entered his guilty plea, imposed upon petitioner a sentence of six years to life imprisonment.

Following affirmance of petitioner's judgment of conviction by the Appellate Division and denial of leave to appeal to the New York State Court of Appeals, the instant petition for writ of *certiorari* ensued.

POINT ONE

The petition for a writ of *certiorari* should be denied.

Petitioner frankly concedes his guilt both of the original charges against him, two counts of criminal sale of a controlled substance in the first degree (defined in pertinent part in N.Y. Penal Law §220.43 as the sale of two or more ounces containing a narcotic drug),[1] and the single lesser charge to which he was allowed to plead guilty in full satisfaction of all charges, criminal sale of a controlled substance in the second degree (defined in pertinent part in N.Y. Penal Law §220.41 as the sale of one-half ounce or more containing a narcotic drug).[2] Petitioner does not challenge or seek to overturn his conviction itself on his guilty plea. Rather, petitioner urges that the sentence of incarceration imposed upon him of six years to life imprisonment pursuant to the plea arrangement, concededly agreed to by petitioner, petitioner's counsel, the prosecutor and the court, is itself violative of the prohibition in the Eighth Amendment to the United States Constitution against cruel and unusual punishment. Petitioner's argument is wholly without merit and his petition for a writ of *certiorari* should therefore be denied.

The Supreme Court of the United States has previously rejected the argument being made by this petitioner. *Cer-*

1. Criminal sale of a controlled substance in the first degree is punishable by a maximum sentence of twenty five years to life imprisonment. N.Y. Penal Law §70.00.

2. Criminal sale of a controlled substance in the second degree is punishable by a maximum sentence of eight years four months to life imprisonment. N.Y. Penal Law §70.00.

tiorari was denied in *People* v. *Broadie*, 37 N.Y.2d 100, 332 N.E. 2d 338, *cert. den.* 423 U.S. 950 (1975) wherein it was specifically held that a sentence of six years to life imprisonment, precisely the sentence of the petitioner in the instant case, for the "street sale" of cocaine, precisely the offense committed by the petitioner in the instant case, does *not* violate the Eighth Amendment prohibition against cruel and unusual punishment. Similarly, *certiorari* was also denied by this Court in *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), *cert. den.* 439 U.S. 1091 (1979), wherein a sentence of six years to life imprisonment for a class A drug felony, the same level crime as that of which the instant petitioner stands convicted, was held *not* to constitute cruel and unusual punishment within the meaning of the Eighth Amendment. See also, *Peters* v. *Quick*, 567 F. Supp. 331 (USDC, SDNY, 1983), *aff'd* 732 F.2d 142 (2d Cir. 1984) (sentence of six years to life imprisonment for sale of cocaine held not so grossly disproportionate to the offense as to violate Eighth Amendment despite defendant's personal background as a hard-working businessman and family man with no prior criminal record).

In *Hutto* v. *Davis*, 454 U.S. 370 (1982), the Supreme Court reaffirmed the doctrine enunciated in *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980) that ". . . for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." Thus, ". . . successful challenges to the proportionality of particular sentences should be 'exceedingly rare.' " *Hutto*, 454 U.S. at 374. In accord is *Weems* v. *United States*, 217 U.S. 349 (1910). That the instant petition does not present such an "exceedingly

rare'' case is readily apparent from a review of the facts in *Rummel* and *Hutto*. In *Rummel*, the defendant was sentenced to life imprisonment under a Texas recidivist statute for his third felony for theft of property where the aggregate value of the property stolen in all three crimes totalled approximately $230. The Supreme Court held that Rummel's sentence was not so grossly disproportionate to the offenses committed as to violate the Eighth Amendment prohibition against cruel and unusual punishment. In *Hutto*, the defendant's sentence of forty years imprisonment for possession of nine ounces of marijuana was held not to offend the Eighth Amendment. This petitioner's case, involving the evil, destructive and epidemic plague of narcotic drug sales, with all its attendant violence and ruinous effect on addicts, their families and the victims they so often prey upon to acquire the funds necessary to "support their habit," involves a far more serious type of crime than either *Rummel* or *Hutto* but yet resulted in a lesser sentence. Thus, by no fair or rational standard can the six year to life sentence imposed upon the petitioner in the instant case, notwithstanding his alleged good family background and loss of a finger in an industrial accident, be deemed so grossly disproportionate to his crime as to arguably constitute cruel and unusual punishment within the meaning of the Eighth Amendment.

Accordingly, the instant petition is patently without merit.

Conclusion

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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June, 1986